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No. 02-124

In The
Supreme Court of the United States

JAMES W. SIKES and FELIX KEMP, Individually and on Behalf of All Other Persons Similarly Situated,

Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent AT&T's Brief in Opposition actually *highlights* how the "routine application of settled law" in the Eleventh Circuit (Opp. Br. at 1) embodies a class action jurisprudence sharply at variance with the law in other circuits and emphasizes the need for guidance from this Court. The Eleventh Circuit is adopting *per se* rules forcing district courts to reject class certification of *any* cases involving consumer deception – a paradigmatic aggregated small claim context in which the effective functioning of Rule 23 is critical – and to refuse class treatment of *any* claims involving aspects of multiple states' laws, even when the district courts make factual findings that strongly support class certification according to any fair application of Federal Rule 23.

I. Unlike Other Circuits, the Eleventh Circuit Has Engaged in *De Novo* Fact-Finding, Overruling the District Court's Findings, in Order to Decertify Class Actions

The district court based its class certification decision largely on its knowledge of the disputed issues and its review of the evidence available to try the case (which had emerged after lengthy discovery and evidentiary-type hearings). The district court concluded, for example, that AT&T's billing records sufficed as evidence of each proposed class member's calls to the "Let's Make a Deal" phone lines and the charges levied for those calls; that class members' reliance on the deceptive advertisements could be established on a class basis because the "900" telephone numbers called by class members appeared only in those ads; and that the ads and the call-in programs were sufficiently similar in the respects relevant to plaintiffs'

claims that divergent evidence would not proliferate or prove to be unmanageable. *Sikes v. American Tel. & Tel. Co.*, 179 F.R.D. 342, 347 (S.D. Ga. 1998).

The Eleventh Circuit did not accept those facts and then decide that the district court had applied the law to them incorrectly. Instead, the appellate court simply re-wrote the facts.

The Eleventh Circuit went so far as to label the district court's reference to the evidentiary value of AT&T's business records as an unfounded "legal presumption." *Sikes v. Teleline, supra,* 1365. The Eleventh Circuit found, as a matter of fact, that the only probative evidence of whether AT&T was paid for a charge is the customer's own word and personal records. *Id.* Contrary record evidence was accorded no probative value by the Eleventh Circuit.

The above illustrates the present methodology by which the Eleventh Circuit applies the abuse of discretion standard. Such is in stark contrast to the review exercised by other circuits of orders that certify class actions. *E.g.*, *In re Visa Check/Mastermoney Antitrust Lit.*, 280 F.3d 124, 140 (2d Cir. 2001), *cert. denied*, 2002 WL 554313 (U.S.); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985); *Yaffe v. Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

This method of appellate decision-making invaded the district court's fact-finding prerogative and leaves all district courts in the circuit thoroughly confused about how to decide certification motions (short of *per se* denial, which may contradict obvious reality). Exercise of this Court's supervisory power is appropriate to remedy the

Eleventh Circuit's usurpation of the district court's fact-finding job.

II. Other Circuits Do Not Conclude That the Issue of Class Members' Reliance in Mass Mail and Wire Fraud Cases *Per Se* Prevents Class Treatment

Reliance has emerged as the critical issue in deciding on class treatment in cases involving consumer deception (often under the federal mail and wire fraud statutes), because some courts, including the Eleventh Circuit in this case, hold that a person's reliance on defendant's deception can be proved only if that person (and therefore each class member) testifies – which typically is then said to render the case unmanageable as a class action. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1361 (11th Cir. 2002); *Mulligan v. Choice Mortgage Corp.*, 1998 WL 544431, p.6 (D.N.H. 1998). As described in the Petition, the result has been chaos in how class actions are handled in the various circuits.

This case presents an excellent example of how class actions that present the question of plaintiffs' reliance (on defendants' deceptive misconduct) can be managed, using normal rules of circumstantial evidence, inferences, and rebuttable factual presumptions that have roots in well-accepted common law. It *does* make sense to conclude (or infer, or presume), in assessing the manageability of a class action, that a plaintiff relied on defendants' deceptive advertisement if the phone number called by the plaintiff appeared only in that ad and could have been the only basis for causing a call to be made to AT&T's 900 number. Causation and reliance under such facts are thus susceptible to proof by class-wide evidence. *See Colonial Refrigerated*

Transportation, Inc. v. Mitchell, 403 F.2d 541, 549 (5th Cir. 1968) ("In law, as elsewhere, actions may speak louder than words.") In other cases, comparable persuasive evidence might not appear, which is why any *per se* approach would be wrong. At present, the circuits are at odds as to whether the presence of reliance as an element in a proposed class action *ipso facto* dooms class treatment. Compare *Sikes v. Teleline, supra*, with *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985). *See Mulligan, supra*, p.6; *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D. Ill. 1989); *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665 (D.Kan 1989). The viability of many consumer deception class actions in the federal courts (pleading federal mail or wire fraud violations, for example) depends on how this issue is resolved. Certiorari should be granted, and this Court should return the determination of how the reliance issue may affect class certification to the district courts, which can determine on the specific facts of individual cases whether class treatment of that issue is appropriate.

III. Other Circuits Do Not Conclude That Proposed Nationwide Class Actions Involving the Application of the Laws of Multiple States *Per Se* Cannot Be Certified

AT&T's arguments on the multiple state law issue demonstrate the ripeness of this issue for certiorari. AT&T again argues strongly for a *per se* rule – that class treatment must be rejected if the laws of multiple states apply to any issue in the case. As discussed in the Petition, the Eleventh Circuit's adoption of that rule, even when state law issues arise through incorporation in a federal statute, is at variance with the law in other circuits. Petition, p.25.

In some situations, the presence of multiple state law issues indeed should prevent class certification. In fact, AT&T cites cases that reject certification of national classes that assert purely state law causes of action, such as wrongful death or other state law torts involving bodily injury. *E.g.*, *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996), *affirmed*, 521 U.S. 591 (1997) (proposed class asserting present and future state law bodily injury tort claims against numerous defendants); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (class purporting to represent all tobacco-addicted smokers and their heirs against all tobacco companies asserting *inter alia* state law fraud, negligence, warranty, consumer, and strict liability claims); *Spence v. Glock*, 227 F.3d 308 (5th Cir. 2000) (putative class that implicates the tort policies of all 51 jurisdictions of the United States).

But there is a division among the circuits, as described in the Petition, whether that conclusion should apply in all cases. This action, asserting as it does a federal cause of action (RICO gambling) involving a simple issue of state law that is easily applied to simple facts, provides an excellent example in which a *per se* rule is inadequate and counter-productive. The district court found, and clearly had a reasonable basis for doing so, that multiple state gambling laws did not present undue manageability problems, because the variations were in fact fairly modest with respect to the issues in this case (the only relevant aspect of gambling law that varied among states was whether a "free alternative means of entry" provided an effective gambling exception). Instead of the Eleventh Circuit's *per se* rule, the approaches in other circuits that at least allow consideration of and

deference to the district court's reasons for concluding that class treatment is manageable should be adopted.

AT&T cites the well-reasoned opinion in *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (Ginsberg, J. and Edwards, J.), *cert. denied*, 482 U.S. 915 (1987). *Walsh* conflicts squarely with the Eleventh Circuit's *per se* rule barring national class actions that include a state law issue. The District of Columbia Circuit recognized the viability of a nationwide class action involving a state law issue so long as the district court determines that variations in state law "can be effectively managed." *Id.* at 1017. That court of appeals validated the appropriateness of certification of a nationwide class "if [plaintiffs] proffered strong indication that major factual issues in each class member's claim . . . are 'identical or virtually so.'" *Id.* As AT&T itself demonstrates, the only open gambling issue – the effectiveness of a free alternative means of entry – is quite manageable and, in fact, already has been managed by the district court in related litigation, Opp. Br. at 24 n.18, which further demonstrates the need to restrict appellate intrusion on the district court's fact-finding. Yet, in this case, the Eleventh Circuit sharply diverged from the better approach taken in other circuits, as exemplified by *Walsh,* and insisted on applying its *per se* rule in order to decertify the class.

The circuits are split. This Court's guidance is needed. Certiorari should be granted.

Respectfully submitted,

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